APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 06-1471

[Filed January 24, 2008]

ANDREW POLICASTRO, Appellant	)
v.	)
DR. THEODORA P. KONTOGIANNIS, Principal Tenafly High School; TENAFLY BOARD OF EDUCATION	)

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 04-cv-1219
(Honorable Joel A. Pisano)

Before SCIRICA, *Chief Judge*, FUENTES and CHAGARES, *Circuit Judges*.

OPINION OF THE COURT

SCIRICA, *Chief Judge*.

Appellant Andrew Policastro, a teacher at Tenafly High School, sued the school's principal, Dr. Theodora Kontogiannis, and the Tenafly Board of Education for violation of his First Amendment right to freedom of speech. Following a bench trial, the District Court dismissed Policastro's claims and entered judgment in favor of both Kontogiannis and the school board. We will affirm the judgment in part and dismiss in part.[1]

I.

Policastro is a science teacher at Tenafly High School. On March 13, 2002, at 8:15 a.m., a memorandum was distributed to all Tenafly High School staff members through the teachers' school-provided mailboxes. The memorandum involved a labor dispute between teachers and their union over negotiations of a proposed collective bargaining contract. A ratification vote on the proposal was scheduled that same afternoon. Policastro was one of thirteen teachers who signed the memorandum.

In the words of the District Court, the memorandum was "plain vanilla," containing no vulgarities or obscenities. Yet the memorandum prompted complaints to Dr. Theodora Kontogiannis, principal of Tenafly High School. One complaint reported a "commotion in the library" over the memorandum, and another reported arguments among teachers. Kontogiannis, deciding the memorandum was unacceptably disrupting school activities, removed

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[1] The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343, and we have appellate jurisdiction under 28 U.S.C. § 1291.

all remaining copies from the teachers' mailboxes. Immediately thereafter, a teacher reinserted copies in the mailboxes. Kontogiannis again ordered the memorandum removed and the mailroom door locked for the remainder of the school day.

Based on these events, Policastro filed suit against Kontogiannis and the school board. He alleged that Kontogiannis's removal of the memorandum violated his First Amendment right to free speech, and he challenged as unconstitutional a Tenafly School Board policy restricting the use of teacher mailboxes. Defendants filed a motion to dismiss for failure to state a claim. The District Court granted the motion, and Policastro appealed. We vacated the dismissal and remanded to the District Court for further proceedings. *See Policastro v. Kontogiannis,* No. 04-2883, 2005 WL 1005131 (3d Cir. Jan. 12, 2005).

The District Court conducted a bench trial at which Policastro appeared *pro se.* At the conclusion of both sides' testimony, the District Court adjudicated Policastro's claims and found in favor of both Kontogiannis and the school board and against Policastro.[2] This appeal followed.

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[2] Keen to the need for exigency in this matter, the District Court issued an oral decision from the bench. The judgment employed the term "dismissal," but on review of the transcript it appears plain the court was adjudicating Policastro's claims. Any confusion in wording may have been due to our prior decision vacating the original dismissal for failure to state a claim and remanding for fact finding. But the record reveals Policastro's claims were adjudicated following a bench trial that included testimony from all relevant parties and witnesses.

II.

A.

The Tenafly School Board has a written policy on using teacher mailboxes ("Mailbox Policy"), which provides:

> Mailboxes are the property of the Tenafly Board of Education and should be used for school business. Any staff member wishing to distribute flyers/announcements etc. (via the mailboxes) must have prior approval from the principal or vice-principal.

Policastro claims this policy is unconstitutional on its face. The District Court characterized this claim as an overbreadth challenge, stating it would try the issue of whether the policy "impermissibly extends [to] . . . speech that cannot be constitutionally restricted." (Tr. at 5:20-22). Policastro did not object.[3]

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[3] The *amici curiae* contend the Mailbox Policy is also unconstitutionally vague. But there was no testimony during the bench trial about the risk of discriminatory application of the Mailbox Policy or whether school officials were endowed with undue discretion under the policy. These questions would be central to a vagueness challenge. *See, e.g., Kreimer v. Bureau of Police for Morristown,* 958 F.2d 1242, 1266 (3d Cir. 1992). Accordingly, we will only address overbreadth. *See Gass v. Virgin Islands Tel. Corp.,* 311 F.3d 237, 246 (3d Cir. 2002) ("[I]t is well established that failure to raise an issue in the district court constitutes a waiver of the argument. . . . We only depart from this rule when manifest injustice would result from a failure to

A regulation is unconstitutionally overbroad where there is "'a likelihood that [it]s very existence will inhibit free expression' by 'inhibiting the speech of third parties who are not before the Court.'" *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984)). "[A]voidance of this chilling effect is at the heart of the overbreadth doctrine." *Gasparinetti v. Kerr*, 568 F.2d 311, 317 (3d Cir. 1977) (citation omitted). But a regulation's inhibiting nature must be "'not only real but substantial in relation to [it]s plainly legitimate sweep'" to be held unconstitutional. *Saxe*, 240 F.3d at 214 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). "Because the overbreadth doctrine is 'strong medicine,' it is to be used sparingly, where the demonstrated overbreadth is considerable." *Kreimer*, 958 F.2d at 1265 (quoting *New York v. Ferber*, 458 U.S. 747, 769 (1982)) (some internal quotation marks omitted).

Here, the District Court held the Mailbox Policy had no actual or potential chilling effect. The court found that Tenafly teachers, including Policastro, had distributed personal documents through the teachers' mailboxes both before and after the subject memorandum was confiscated. The court also found, and all parties agreed, that Tenafly High School administrators had never denied prior approval of a mass distribution, and that–with the exception of the subject memorandum here–nothing had ever been

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consider a novel issue.") (citation and internal quotation marks omitted).

removed from the mailboxes. Furthermore, in terms of the Mailbox Policy's "legitimate sweep," the court credited Kontogiannis's testimony that the purpose of the policy was to ensure that the mailboxes did not become overstuffed to the point where documents involving school business would be missed or lost. Based on these facts, the court concluded that any inhibiting impact of the Mailbox Policy was insubstantial relative to its legitimate scope.

We agree that the record fails to show that the Mailbox Policy has had an actual or potential chilling effect on teacher speech. Policastro admits that "[s]ince the removal of the memo . . . use of the mailboxes by teachers for personal messages (memos, notes, cards, etc.) has continued as usual, without prior approval." Policastro Brief at 5. Accordingly, we will affirm the District Court's denial of Policastro's overbreadth challenge.

B.

Policastro also claims the Mailbox Policy is unconstitutional as it was applied to him. But Kontogiannis testified at trial that she removed the memorandum because of a disruption among the teachers that threatened to disrupt the school's program. There is no evidence in the record demonstrating the Mailbox Policy was the cause of the memorandum's removal. Accordingly, Policastro has not shown he suffered any injury under the policy or that the policy has ever in fact been applied to him. We will affirm the District Court's denial of Policastro's "as applied" challenge to the Mailbox Policy.

III.

Policastro also claims his First Amendment right to free speech was violated whether or not Kontogiannis removed the subject memorandum under the Mailbox Policy.[4] He did not seek damages. He seeks declaratory and injunctive relief only, which, for the reasons set forth below, are forms of relief we have no authority to provide on the facts here. Therefore, we will dismiss this claim as non-justiciable, because even if meritorious, we could not redress it.

To bring and maintain a lawsuit through adjudication, Policastro must have standing. *E.g., Artway v. Attorney Gen. of N.J.*, 81 F.3d 1235, 1246 (3d Cir. 1996). "The three elements necessary to establish the irreducible constitutional minimum of standing are: (1) the plaintiff must have suffered an injury in fact-an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Taliaferro v. Darby Twp. Zoning*

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[4] Policastro's *pro se* complaint has been liberally construed to include a claim under 42 U.S.C. § 1983 that the school's actions in removing the memorandum infringed on his First Amendment right to free speech. *See Policastro v. Kontogiannis*, No. 04-2883, 2005 WL 1005131 (3d Cir. 2005). This claim is distinct from his "as applied" challenge to the Mailbox Policy, because he alleges his speech was unconstitutionally silenced by the school's actions even if those actions were motivated by something other than the Mailbox Policy.

Bd., 458 F.3d 181, 188 (3d Cir. 2006) (citing *United States v. Hayes*, 515 U.S. 737, 742-43 (1995)).

In our prior opinion vacating the District Court's dismissal for failure to state a claim, we acted without the benefit of fact-finding. Here, we have discovery and a trial record. On prior review, Policastro's standing was not in question. Policastro's *pro se* complaint, construed liberally, alleged Kontogiannis removed the offending memorandum from teacher mailboxes under the school's Mailbox Policy. Had this been proven, equitable relief might have been proper if the policy were unconstitutional, facially and/or as applied. But the trial testimony unequivocally shows the subject memorandum was removed because of the perceived disturbance it caused, not because of the Mailbox Policy. Because the school's action in removing the memorandum was an isolated occurrence wholly unrelated to the Mailbox Policy, the facts present no ongoing harm or controversy for us to remedy. Accordingly, whether or not Policastro had standing prior to remand, his claims are now moot.

A mootness inquiry asks whether a claimant's standing continues throughout the litigation. "A case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Donovan ex. rel. Donovan v. Punxsutawney Area School Bd.*, 336 F.3d 211, 216 (3d Cir. 2003) (citation omitted). "The court's ability to grant effective relief lies at the heart of the mootness doctrine." *Id.* "That is, if developments occur during the course of adjudication that eliminate a plaintiff's personal stake in the outcome of a suit or prevent a court from being able to grant the requested relief, the case must be

dismissed as moot." *Id.; see also Green v. Branson,* 108 F.3d 1296, 1299 (10th Cir. 1997) ("The touchstone of the mootness inquiry is whether the controversy continues to touch the legal relations of parties having adverse legal interests in the outcome of the case.") (citation omitted). "The crucial question is whether 'granting a present determination of the issues offered . . . will have some effect in the real world.'" *Utah Animal Rights Coalition v. Salt Lake City Corp.,* 371 F.3d 1248, 1256 (10th Cir. 2004) (alterations in original) (citations omitted).

At this juncture, no available remedy would redress Policastro's suit. He has not sought damages.[5]

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[5] Policastro's suit would likely survive a justiciability challenge if he had sought damages. *See, e.g., Boag v. MacDougall,* 454 U.S. 364 (1982) (holding the transfer to another prison did not moot a prisoner's claim for damages arising from placement in solitary confienement); *Donovan,* 336 F.3d at 218 (holding claims for damages and attorneys fees continued to present a live controversy even though claims for declaratory and injunctive relief were moot); *Jersey Cent. Power & Light Co. v. New Jersey,* 772 F.2d 35, 41 (3d Cir. 1985) ("[T]he availability of damages or other monetary relief almost always avoids mootness. . . ."); *Blau v. Fort Thomas Public School Dist.,* 401 F.3d 381, 387 (6th Cir. 2005) (noting the existence of a damages claim "ensures that [a] dispute is a live one over which Article III gives us continuing authority.") (multiple citations omitted). But Policastro chose not to assert a claim for damages. A request for damages will generally save a case from becoming moot when equitable relief no longer provides an effective remedy, but courts will not read a claim for damages into a complaint that contains no such request. *See Seven Words LLC v. Network Solutions,* 260 F.3d 1089, 1097 (9th Cir. 2001) (holding claims moot where appellant sought only injunctive and declaratory relief but failed to request damages).

Injunctive relief would be unavailable for Policastro at this time, and declaratory relief would amount to no more than an advisory opinion regarding the "wrongfulness" of past conduct. *See, e.g., Green v. Branson,* 108 F.3d at 1299-1300 (10th Cir. 1997) ("[A party's] 'legal interest' must be more than simply the satisfaction of a declaration that a person was wronged.") (citing *Ashcroft v. Mattis,* 431 U.S. 755, 761 (1987)). The Supreme Court has consistently held "a federal court has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them." *Preiser v. Newkirk,* 422 U.S. 395, 401 (1975) (quotation omitted). The Court has provided further guidance on this point:

> "In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces–the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant. This is no less true of a declaratory judgment suit than of any action. The real value of the judicial pronouncement–what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion–is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*"

Rhodes v. Stewart, 488 U.S. 1, 3-4 (1988) (quoting *Hewitt v. Helms,* 482 U.S. 755, 761 (1987)) (emphases in original).

Accordingly, where Policastro has not sought damages, and we are unable to afford him meaningful alternative relief, his claim that Kontogiannis's removal of the subject memorandum from teacher mailboxes violated his First Amendment right to free speech is moot.[6]

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[6] We note that the "capable of repetition yet evading review" exception to mootness, *e.g.*, *Brody ex. rel. Sugzdinis v. Spang*, 957 F.2d 1108, 1113-15 (3d Cir. 1992), does not apply here. "This extremely narrow exception to the mootness doctrine is applicable only where: 1) the challenged action is too short in duration to be fully litigated before the case will become moot; and 2) there is a reasonable expectation that the complaining party will be subjected to the same action again." *Donovan*, 336 F.3d at 217 (citing *Weinstein v. Bradford*, 423 U.S. 147 (1975) (per curiam)). The prospect of a similar memorandum being removed from teacher mailboxes under the facts here is too speculative to warrant invocation of this narrow exception. *See, e.g., Preiser v. Newkirk*, 422 U.S. 395, 403 (1975) ("Any subjective fear [Plaintiff] might entertain of being again [subjected to] circumstances similar to those alleged in the complaint . . . is indeed remote and speculative and hardly casts [a] 'continuing and brooding presence' over him . . . .") (citation omitted). Even looking beyond the unique circumstances of the union negotiations at the heart this case, the record demonstrates, and Policastro himself asserts, that no other item–among the many hundreds of items inserted in teacher mailboxes–has been removed from teacher mailboxes, either prior to or subsequent to the removal of his memorandum. Moreover, because of email and other technologies, the teacher mailboxes no longer serve as the primary means of communication between the school and its teachers.

IV.

For the foregoing reasons, we will affirm the District Court's denial of Policastro's facial and as applied challenges to the school's Mailbox Policy. We will also dismiss as non-justiciable Policastro's claim that his First Amendment right to free speech was violated.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-1471

[Filed January 24, 2008]

ANDREW POLICASTRO,	)
Appellant	)
	)
v.	)
	)
DR. THEODORA P. KONTOGIANNIS,	)
Principal Tenafly High School;	)
TENAFLY BOARD OF EDUCATION.	)
	)

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 04-cv-1219
(Honorable Joel A. Pisano)

Argued January 23, 2007

Before: SCIRICA, *Chief Judge*, FUENTES and CHAGARES, *Circuit Judges*

JUDGMENT

This cause came to be heard on the recrod from the United States District Court for the District of New Jersey and was argued by counsel on January 23, 2007. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered January 11, 2006, be, and the same is hereby affirmed in part and appellant's claim that his First Amendment right to free speech was violated is dismissed as non-justiciable. Costs taxed against appellant. All of the above in accordance with the opnion of this Court.

ATTEST:

/s/ Marcia M. Waldron, Clerk

DATED: January 24, 2008

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

CIVIL NO. 04-1219

[Dated January 11, 2006]

ANDREW POLICASTRO,	)
	)
Plaintiff,	)
	)
-vs-	)
	)
DR. THEODORA KONTOGIANNIS, TENAFLY BOARD OF EDUCATION,	)
	)
Defendants.	)
	)

Newark, New Jersey
January 11, 2006

BEFORE:
THE HONORABLE JOEL A. PISANO
UNITED STATES DISTRICT COURT JUDGE

THE COURT: Back on Policastro. I have, since the recess yesterday, considered all of the issues at some length. I've also had the benefit of reading the

transcript of the entire proceedings so I'm prepared to rule on this.

Is there anything else anybody would like to argue, Mr. Policastro, Mr. Thibault, anything you would like to argue?

MR. THIBAULT: No, I think we argued everything on the motion and partial summary judgment.

THE COURT: Mr. Policastro, do you have anything else you would like to say about this?

MR. POLICASTRO: No, your Honor.

THE COURT: All right.

I'm going to do this from the bench without writing a formal opinion for a couple of reasons. The first being that this case has been pending for long enough, I think for everybody's purposes, having now occupied the resources of five federal judges and their staff.

Based upon the experience in trying the case yesterday, we had the participation of a significant number of faculty of Tenafly High School, which has been, from what I gather, not only explicitly from the record but reading between the lines, been embroiled in whatever this dispute came from since 2002.

I think the parties are interested in a speedy resolution and so is the Court.

The second reason I'm not going to submit this to formal writing is that, as I indicated yesterday, there

doesn't seem to be much of a dispute either as to the law or the facts of this case. I don't think it would serve anybody's purpose to add to the literature by publishing or filing yet another opinion discussing the legal landscape pertaining to the type of expression which is in this case.

We've got a number of cases speaking about the subject matter and we'll be citing to some of them. They're already in the briefs and they're already in the opinions, but taking as the law of the case the opinion from the Third Circuit in this matter, there is a recital of the legal landscape which is entirely consistent with this Court's legal discussion on the -- in the opinion in which the Court dismissed the complaint originally.

The Third Circuit did not in any way change this Court's view of the law, but rather concluded that the Court was improvident in dismissing this case without making some findings of fact. That is to say, the Third Circuit found that this was not an appropriate dismissal based upon the allegations in the complaint, but rather needed to develop a record as stated in the slip opinion at page six; in order to require Tenafly to put forth facts which might reasonably have led school authorities to forecast a specific and significant fear of disruption, not just some remote apprehension of disturbance.

That, of course, is language that comes directly from the *Tinker* case, which has been cited here more times than we need to mention, and is also entirely consistent with other case law which has been published on the subject, particularly including the

opinion in *Saxe v. State College Area School District*, Third Circuit opinion, 240 F.3d at page 200.

The *Saxe* case is pretty interesting because it does contain a very clear review of the *Tinker* standards and then goes further into some discussion of some other cases involving school law, retaliation, employment decisions, of course which are not implicated here, for example, from *Hazelwood* and some other cases that we're familiar with.

The other thing that's interesting about the *Saxe* opinion is that it also included a discussion of a challenge, a facial challenge to a regulation which was designed to restrict and control expression within the school.

So all of that being said, it appears to me that there, as I indicate, is not much of a dispute as to what the law in this case is. Generally speaking, quoting from *Saxe*, referring to *Tinker*, page 211, "regulations of student speech is generally permissible only when the speech would substantially disrupt or interfere with the work of the school or the rights of other students." Again, *Saxe* is talking about student speech, not factually pertinent here, but the speech, the regulation of the speech is subject to the same legal standards.

And as oddly enough Judge Alito goes on, on page 211, "As subsequent cases have made clear, *Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of the disturbance."

That's an interesting quote because I believe it serves as a basis to analyze both types of claims in this case. We have in this case a challenge to the act of Dr. Kontogiannis in removing from the teachers' mailboxes the exhibit P-1 that we have in evidence and closing the teacher mailboxes thereafter; and, secondly, we have a challenge to the regulations maintained by the Tenafly High School and Board of Ed, which would require prior approval if a teacher or staff member wanted to make a mass distribution, either of written materials in the teachers' mailboxes or in the electronic form in the e-mails.

I say that this quote which I'll read again, "*Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance," that statement can be applied and can be analyzed in the face of both types of claims in this case.

Now, the facts of the case again are really not much in dispute. They were pretty much fleshed out in the briefs before this Court on the motion to dismiss, except for the fact that we didn't have the benefit of the testimony of some of the individuals who shed some light on the ultimate question as framed by the Third Circuit, which is whether Tenafly can come forward with facts to demonstrate that there was a substantial -- that there was a fear of significant disruption or disturbance in school affairs.

The case appears to arise out of some sort of internal Tenafly teacher union controversy. There hasn't been any direct testimony on the subject, but we had the benefit of the testimony of a number of teachers, including Mr. Policastro, who was a teacher,

and still is from what I gather, a teacher at Tenafly High School. We had the testimony of James Vere, Douglas Golde, Anne Lander, Felice Loffredo, James Sutera, Diane Kratz, Adam Rendell, April Celli, Kenneth Berman and the secretary to the director of athletics, Chloie Biscaldi. We also have had the testimony from Dr. Kontogiannis, who was and is the principal and who took the action here both to remove the memorandum, exhibit P-1, and also shed light on the purpose and theory of the regulation for prior approval.

We also had the testimony of Howard Glaser who was not a teacher at Tenafly High School, but rather was in a position of leadership in the teachers' union and became aware of the facts that were ongoing on the date in question of March 13, 2002.

In any event, the facts are, and I find as facts that there was some sort of an internal, internecine squabble among the rank and file of the Tenafly Teachers' Union; that on the day in question there was to be a ratification vote as to a proposed contract which had been negotiated by the teachers' union on behalf of its members; that on March 13, 2002, someone created the document, P-1, which was ultimately signed by 13 individuals, including Mr. Policastro, the plaintiff here; Mr. Policastro did not author the document nor did he distribute the document which I also find to be an interesting ironic addition to this factual scenario.

We have a plaintiff who neither authored nor distributed the document that is in question, yet he is

the one who is asserting some afront to his First Amendment freedom of expression.

Be that as it may, he adopts the content of the memo and we will assume, and there is no issue, that his expression and rights to expression are in issue in the case as a result, at least it hasn't been challenged on that basis.

Now, the language in the memorandum consists of five questions as they are stated which were at least hypothetically being directed to the negotiating team who had arrived at whatever the deal was ultimately going to be presented to the rank and file of the teachers' union. There is nothing in the record to indicate whether or not these five questions or issues had been raised previously in the negotiating process or whether anybody who signed P-1 was even on the negotiating team, but be that as it may, the document appears to contain five questions directed toward the negotiating team.

There is testimony that Douglas Golde, on the day in question, is the individual who placed P-1 in each of the teachers' mailboxes in Tenafly High School and he said that he remembered doing it somewhere about 8:30 in the morning. The facts are that he was told sometime later that morning that they were gone, so he went back into the mail room and replaced in every teacher's mailbox another copy of P-1.

There is no testimony as to how the document was created, whether it was copied on school copy machine utilizing public supplies, we don't know where he got it from, it doesn't really matter. In any event, at

sometime following Mr. Golde's placement and distribution of these two copies of the memo, P-1, it is a fact that has been adduced not only through the testimony of Dr. Kontogiannis but through the testimony of some of the individuals who testified, including Mr. DiGregorio, by the way, whom I left out I believe of the statement of witnesses that I set forth.

It is clear from the testimony of the witnesses and it is in the record that the memorandum, P-1, did result in controversy within the Tenafly High School building. That is testimony that came from Mrs. Kratz, it is testimony that came from Miss Biscaldi, it is testimony that came from Miss Loffredo and it is testimony that came from Mr. DiGregorio and from Dr. Kontogiannis herself. It was characterized somewhat differently depending upon the frame of reference of each individual who knew about it, but suffice it to say, Dr. Kontogiannis summarized the scenario as being one of disruption, confusion, there was controversy, teachers were out of their classrooms discussing the contents of the memo in the hallways, in the library and she concluded that there was a significant disruption in the operation of the school such that she took it upon herself, first of all, to remove P-1 from the mailboxes in the first instance and then when she learned that they had been replaced, to physically close the mail room in order to restore order to the school community.

That testimony is corroborated, at least in substance, by the testimony of the other individuals who were aware of the controversy. Most significantly her testimony, that is the testimony of the principal, was corroborated significantly by Mr. DiGregorio, who

was the library monitor, who testified that there was, in fact, a significant disruption involving teachers who were present in the library and who were not acting in a way, to use the pedagogical term, on task. It is also corroborated by the testimony of Miss Biscaldi, it is corroborated by the testimony of Mrs. Kratz and it is corroborated by the testimony of Mr. Glaser, who was at the time, I believe he still is, a special education teacher at the middle school in a different building, but in his capacity as a member of the personal rights committee of the Tenafly Teachers' Union, he received notice of the problem and was asked to come over and he did come over and speak to Dr. Kontogiannis about the incident.

I find the foregoing to be facts that are supported in this record.

Now, Mr. Policastro, as plaintiff, makes a claim that his freedom of expression was violated and restricted unconstitutionally, first of all, by the conduct of Dr. Kontogiannis in removing the memo, P-1, from the teacher mailboxes and subsequently closing the mail room and secondly, that their exists in the Tenafly High School a regulation promulgated by the Board of Education which requires prior approval in the event of a distribution on a wholesale basis of any memos through the mailboxes or electronic communications over the e-mail system.

Now, putting aside for the moment as we get to that second claim, putting aside for the moment that it appears to the Court that at least with respect to the e-mail regulation, that it is utterly unenforceable. Putting that aside for the moment, nevertheless, we

need to determine whether, and this is interestingly, as I say, discussed in the Saxe opinion, it is necessary to determine whether there can be a facial challenge that would succeed on a constitutional basis to that regulation.

Mr. Policastro has testified, and the Court accepts as facts, with respect to the second claim, that is the challenge to the prior approval regulation, that as a result of its very existence, Mr. Policastro has refrained from making any attempt to distribute wholesale any written communications in the mailboxes at Tenafly High School.

Of course we cannot lose sight, and I find as a fact, that James Sutera did make a wholesale distribution of written material in the mailboxes without receiving prior approval and he did so in November of 2003, and I find as a fact that Mr. Policastro himself chose to make a wholesale distribution of written material without prior approval in placing the exhibit P-18 in the mailboxes on a date subsequent to March 13, 2002.

This, that is to say the distributions made by Sutera and Policastro, in my view, undercut the plaintiff's claim because there is further testimony in the record, and I find as a fact, corroborated by Dr. Kontogiannis, that approval, prior approval to make a wholesale distribution had never been refused prior to March 13, 2002, nor has it ever been refused subsequent to March 13, 2002.

As a matter of fact, Mr. Policastro, in my view, cannot be heard to complain that this regulation has chilled his rights to expression simply because he has

chosen not to pursue whatever it is he wanted to communicate and his testimony was something about running for president of the state NJEA, the education association and that he made wholesale distributions of materials to teachers in other buildings, but chose to eliminate his own out of fear of enforcement, selective enforcement of this regulation, which I find as a fact was not going to happen.

So the question becomes, with respect to the second type of claim, that directed toward the prior approval regulation, whether that prior approval regulation itself recognized a legitimate pedagogical concern of the administration that there could be a substantial disruption generated.

Now, what is the testimony on that? The testimony as to the meaning and purpose of this prior approval regulation comes from Dr. Kontogiannis and she testified very forthrightly that the purpose for the regulation was to make sure that if there was going to be some wholesale distribution of non-school related communication or material, that is to say something less than a particular communication to some teachers and not others, that she would have a legitimate concern that other communications that are necessary during the school day might be lost in the shuffle. This isn't, in my view, in any way unreasonable. It isn't in any way unreasonable and I must say, Mr. Policastro, this complaint of yours with respect to that regulation is a mystery to me.

So the Third Circuit's opinion in this case raised the question for its ultimate determination whether Tenafly could put forth facts which might reasonably

have led Dr. Kontogiannis to forecast a specific and significant fear of disruption. Well, I have found and I do conclude that Dr. Kontogiannis' testimony is entirely credible, it is corroborated by other witnesses that I have just recounted, but her testimony is entirely credible and believable; that there was following the distribution of the memo, P-1, a substantial disruption in the school.

It is beside the point, in my view, that the language in the memorandum, P-1, was not lude, vulgar, obscene or inflammatory, but it is only relevant to the Court that the distribution of that memo resulted in her mind a conclusion that there was a substantial disruption, and she then set about to exercise her discretion as principal in order to restore order to the Tenafly High School.

I find her testimony to be credible, I find her conduct to have been reasonable under all of the circumstances and, indeed, as an aside, had she not acted in the way she did, I think she could significantly be criticized for permitting a situation of chaos to continue where it certainly didn't belong.

As a result, I conclude as a matter of law that there has been demonstrated by Tenafly a specific -- there has been demonstrated by Tenafly that a significant disruption did occur and consequently as we move to the second claim, that subsequent to March 13, 2002, Mr. Policastro's First Amendment rights had been unconstitutionally chilled, it would seem to me that the events of March 13, 2002, entirely justify the existence of the prior approval regulation because in the mind of Dr. Kontogiannis, if a memorandum,

however plain vanilla, could cause a disruptive situation on March 13, 2002, then why not some other communication subsequently? This, of course, is again in the context of there never having been the refusal to make a wholesale distribution, nor did it prevent both Mr. Policastro and Mr. Sutera and people that we might not even know about because they didn't testify, who may have made wholesale distributions of written materials themselves.

So whether you look at it from the point of view that the regulation is reasonable, that it has a demonstrable reasonable basis from an educational standpoint or whether you look at in connection with and in addition to the events of March 13, it is entirely reasonable for the principal to conclude that there might be an occasion when she should exercise her discretion and refuse to permit a wholesale mass distribution of material.

While we're on the subject, having read the language of this prior approval regulation, it is clear to me from the first paragraph of it that there is absolutely no preclusion from teachers making communications through the use of mailboxes and, in fact, the first paragraph of this regulation, in my view, should be read to be encouraging communication among teachers through the use of mailboxes.

The sentence in dispute, as testified to by Mr. Policastro, relates only to the one part of the last sentence in the second paragraph which requires prior approval in the event of what I conclude is only a wholesale mass distribution of materials and I think the regulation is self-evident to make that distinction.

Having said that and made those conclusions, the same conclusions in my view apply to the e-mail communications, although we know in the modern world, we know as a practical matter that that regulation is probably beyond enforcement and, frankly, I don't know what the Tenafly High School is going to do about that. We have the exhibits which are numerous of jokes, personal communications, frivolous material back and forth, all to the utter waste of time, effort and resources of the public entity.

On that subject, a little bit more. I would be remiss, I think, if I did not recognize what I consider to be an utterly inordinate expense of public resources, Mr. Policastro, represented by this case. This case has been pending in this court, in the Court of Appeals for going on two years. You have a right of access to the courts. Your right of access to the courts has been honored.

I do not have a complaint personally or officially with the fact that you filed this complaint, I do not have any argument with you. You're entitled to do it, you're entitled to be heard fully and I believe you have been fully heard, but taking into account the factual scenario of this case, it is beyond my personal comprehension, Mr. Policastro, first of all, why this was so upsetting to you, but what is upsetting to me and what I do take issue with is the fact that you subpoenaed, while you didn't subpoena them, the Board of Education accommodated you, they indulged your request, to require to be present in this courthouse a large number of staff members of the Tenafly Board of Education.

You have a right to file this lawsuit, you have a right to pursue your rights, I have no quarrel with it, but this represents to me, for whatever your personal motive may have been in pursuing this crusade, this represents to me a tragic waste of public resources.

So for the reasons that I have expressed, notwithstanding my most recent criticism, but for the reasons that I have expressed based upon my fact findings and conclusions of law, I am satisfied that this complaint must be and is hereby dismissed in its entirety and a judgment will be entered in favor of the defendants and against the plaintiff.

Thank you for coming.

Mr. Policastro, I suggest you go back to work.

MR. POLICASTRO: Thank you, your Honor.

THE COURT: Is there any application for costs?

MR. THIBAULT: Your Honor, I think the Tenafly Board of Education at this point will be happy that the complaint is just dismissed.

THE COURT: All right.

The case is dismissed without costs.
(Trial concluded.)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil 04-1219 (JAP)

[Filed January 11, 2006]

Andrew Policastro,	)
	)
Plaintiff,	)
	)
-vs-	)
	)
DR.Kontogiannis, et al.,	)
	)
Defendant.	)
	)

JUDGMENT IN A CIVIL CASE

This action came before the Court for a NON JURY TRIAL. The issues were tried and the Court rendered its decision:

By its decision, the Court established that a judgment of NO CAUSE FOR ACTION be entered in favor of all the defendants, and against the plaintiff, with prejudice and without costs. Ordered case dismissed.

DATE January 11, 2006

S/ JOEL A. PISANO, U.S.D.J.

APPENDIX C

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 04-2883

[Filed January 12, 2005]

Andrew POLICASTRO,	)
Appellant	)
	)
v.	)
	)
Theodora P. KONTOGIANNIS,	)
Principal Tenafly High School;	)
Tenafly Board of Education	)
	)

Submitted Under Third Circuit LAR 34.1(a)
Jan. 5, 2005
Decided Jan. 12, 2005
Order Denying Rehearing April 12, 2005

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 04-CV-01219)
District Judge: Honorable Joel A. Pisano

Andrew Policastro, Tenafly, NJ, pro se.
Arthur R. Thibault, Jr., Apruzzese, McDermott, Mastro & Murphy, Liberty Corner, NJ, for Appellees.

Before: NYGAARD, VAN ANTWERPEN AND ALDISERT, Circuit Judges.

BEFORE: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO, SMITH, FUENTES, FISHER, VAN ANTWERPEN, and ALDISERT, Circuit Judges.[1]

OPINION

PER CURIAM.

Andrew Policastro, a teacher at Tenafly High School in New Jersey, filed a *pro se* civil rights suit in the District Court for the District of New Jersey, alleging violation of his First Amendment right of freedom of speech by the principal of Tenafly High School, Theodora Kontogiannis, and the Tenafly Board of Education, collectively "Tenafly." Tenafly filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim. The District Court granted the motion, and Policastro appeals. We will vacate and remand.

I.

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 and we have appellate jurisdiction under 28 U.S.C. § 1291.

Our review of the District Court's grant of a motion to dismiss is plenary. *Green v. America Online,* 318

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[1] Judge Aldisert's vote is limited to panel rehearing only.

F.3d 465, 470 (3d Cir.), *cert. denied* 540 U.S. 877, 124 S.Ct. 200, 157 L.Ed.2d 140 (2003). We accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom. *Id.* We will affirm only if no relief can be granted under any set of facts the plaintiff could prove. *Id.*

II.

Policastro's complaint alleges that on the morning of March 13, 2002, a memo entitled "Questions for the Tenafly Negotiation Team" (hereinafter the "Memo") and signed by 13 teachers including himself was placed in the internal mail boxes of the Tenafly High School teachers. A35. The Memo was subsequently removed by or at the authority of Principal Kontogiannis. *Id.* The Memo was again placed in the mail boxes, and again removed by or at the authority of Principal Kontogiannis. *Id.* The mail room was then locked for the remainder of the day. *Id.* The ratification vote for the teacher's contract was held later that day after school. *Id.* Policastro also claims that the internal mail boxes are used for "personal messages, holiday cards, birthday cards, gifts, fliers from local merchants, memos from teachers, notes from teachers, notes from parents, notes from students, U.S. mail, union information and administrative concerns." *Id.* Policastro sought as relief (1) a declaration that the administrative policy requiring prior approval of items placed in the mail boxes is unconstitutional; (2) the removal of any reference to the prior approval policy from the administrative manual, teacher contracts, etc.; (3) a declaration that the removal from the mail boxes of any communication between Tenafly public school

teachers is unconstitutional; (4) permission for Tenafly public school teachers to use the school email system for internal and external email between Tenafly teachers; and (5) permission for Tenafly public school teachers to use the school media facilities. *Id.*

Construing this *pro se* complaint liberally, *see Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), Policastro essentially claims that his First Amendment rights are being violated by: (1) the removal of the Memo from the teachers' mail boxes; (2) the policies and/or directives requiring the teachers to obtain prior approval before placing material in the mail boxes; and (3) the prohibition on using the school's email and other media facilities for communications between Tenafly teachers. The prior approval policy, documented in the Administrative Manual for Teachers, states:

> Mailboxes are the property of the Tenafly Board of Education and should be used for school business. Any staff member wishing to distribute flyers/announcements, etc. (via the mailboxes) must have prior approval from the principal or vice-principal.

A36-37.[1]

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[1] Although a court considering a motion to dismiss generally may not consider matters extraneous to the pleadings, a court may consider a "document integral to or explicitly relied upon in the complaint." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997).

III.

A.

It is well established that teachers do not "shed their constitutional rights to freedom of speech . . . at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). However, school officials may still, "consistent with fundamental constitutional safeguards, . . . prescribe and control conduct in the schools." *Id.* Thus, a school may categorically prohibit lewd, vulgar or profane language. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986)). A school may also regulate school-sponsored speech on the basis of any legitimate pedagogical concern. *Id.* (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988)). School-sponsored speech occurs when the school "aims 'to convey its own message'"; whereas private speech occurs when the school "facilitates the expression of 'a diversity of views from private speakers'." *Child Evangelism Fellowship v. Stafford Township Sch. Dist.*, 386 F.3d 514, 524 (3d Cir. 2004) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833-34, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)). Any speech falling outside of these two categories is subject to the general rule of *Tinker* that the speech may be regulated "only if it would substantially disrupt school operations or interfere with the right of others." *Saxe*, 240 F.3d at 214; *see also Tinker*, 393 U.S. at 509; *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 254 (3d Cir. 2002) (applying *Tinker* to school policy that

prohibited students from wearing an expressive t-shirt).

When, as in this case, the forum for the speech is a school internal mail box, the forum is considered non-public. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). Accordingly, any regulation of the forum must be "reasonable in light of the purpose served by the forum" and must be "viewpoint neutral." *Child Evangelism*, 386 F.3d at 526 (quoting *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993)); *see also Perry*, 460 U.S. at 46.[2]

B.

The Memo contained five questions regarding the negotiation of the Tenafly teachers' contract. *See* A10. The Memo does not contain lewd or vulgar statements. Tenafly appears to argue that any speech conducted through the mailboxes is school-sponsored because the mailboxes are the property of Tenafly. Brief on Behalf of Appellees at 13-14 (arguing that Tenafly is not required to promote speech through use of the mailboxes, as opposed to tolerating speech as in

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[2] Policastro argues that the internal mail boxes are a limited public forum as to the teachers, and that *Perry* is distinguishable because it involved non-school employee use of the mail boxes. Informal Brief at 15-18. We need not reach this issue because, as recognized by the District Court, a limited public forum is governed by the same reasonableness and viewpoint neutral standard as a non-public forum.*Child Evangelism*, 386 F.3d at 526.

Tinker). However, in light of Policastro's allegations that other personal materials are distributed in the mailboxes, a reasonable inference can be made that he is alleging that the Memo can not be viewed as school-sponsored. Thus, the speech would fall under the *Tinker* rule, whereby Tenafly can only regulate the speech if it would "substantially disrupt school operations or interfere with the right of others." *Saxe*, 240 F.3d at 214.

The *Tinker* rule requires Tenafly to put forth facts which might reasonably have led school authorities to forecast "a specific and significant fear of disruption, not just some remote apprehension of disturbance." *Id.* at 211; *see also Tinker*, 393 U.S. at 514. Whether or not Tenafly can satisfy this burden involves factual issues that are not appropriate for resolution at this stage of the proceedings.[3] *See Asociacion de Educacion Privada de Puerto Rico, Inc. v. Echevarría-Vargas*, 385 F.3d 81, 86 (1st Cir. 2004) (finding 12(b)(6) dismissal erroneous where facts needed to be developed to determine strength of state's justification for regulation that allegedly restricted First Amendment rights). Accordingly, making all reasonable inferences in Policastro's favor, we find that the complaint adequately states a claim that the Memo was not within the scope of speech that could be

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[3] Tenafly asserts in its motion to dismiss that the prior approval policy is necessary because otherwise the mailboxes would "become inundated with . . . non-school business related documents," and that "[w]ithout some control over what is placed in the teacher mailboxes, important announcements from administration officials could go unnoticed or be discarded by teachers as simply junk mail." Motion Dismiss Brief at 16.

constitutionally restricted. For the same reasons, we find that the complaint states a claim that the prior approval policy also impermissibly extends to speech that can not be constitutionally restricted.

The complaint also alleges that the mailboxes were being used for other personal communications. Thus, even if the Memo, specifically, and the mailboxes, in general, could be constitutionally prescribed, we find that the complaint also states a claim that the removal of the Memo and/or the implementation of the prior approval policy was not reasonable and not viewpoint neutral. *Child Evangelism, supra.*

C.

As to the internal email system and other media facilities,[4] it may be reasonably inferred that Policastro is alleging that there are certain unspecified restrictions on the use of these facilities, despite the facilities being otherwise available for personal communications. Policastro's failure to identify any specific restrictions and/or prohibited communications makes this claim a much closer call. Nonetheless, consistent with the notice pleading requirements of Federal Rule of Civil Procedure 8(a), we find Policastro's allegations sufficient to state a claim that Tenafly's policy regarding email and media facility use

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[4] Policastro's use of the term 'media facilities' apparently encompasses the teachers mailboxes as well as teacher billboards. Informal Reply Brief at 1-2. Because we have previously addressed the mailboxes, this discussion is limited to the teachers' billboards.

is unconstitutionally restrained. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (plaintiff's complaint need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it is based").

D.

Lastly, on appeal Policastro argues that the removal of the Memo violated the letters of the carrier exception to the Postal Service's restrictions on the carrying of letters. *See* 39 C.F.R. § 310.3(b); Informal Brief at 32-34. This claim was not presented in Policastro's complaint or otherwise raised in the District Court. Accordingly, we decline to consider it on appeal. *Lloyd v. Hovensa, LLC.*, 369 F.3d 263, 272-73 (3d Cir. 2004).

IV.

In conclusion, Policastro's complaint adequately states claims for violation of his First Amendment right to free speech. Accordingly, we will vacate the dismissal of the complaint, and remand for further proceedings.

SUR PETITION FOR REHEARING

NYGAARD, J.

The Petition for rehearing filed by the Appellees in the above-entitled matter having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in

the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

It is so ordered.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

No. 04-1219 (JAP)

[Filed June 8, 2004]

ANDREW POLICASTRO	)
	)
v.	)
	)
DR. THEODORA P. KONTOGIANNIS	)
and TENAFLY BOARD OF EDUCATION	)
	)

PISANO, District Judge:

Defendants Dr. Theodora P. Kontogiannis ("Kontogiannis") and Tenafly Board of Education (the "Board") (collectively "Defendants") move to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff Andrew Policastro ("Policastro") opposes this motion. The Court has jurisdiction under 28 U.S.C. §1331, and resolves this motion without oral argument, as permitted under Rule 78 of the Federal Rules of Civil Procedure. For the reasons set forth below, the Court grants Defendants' motion and dismisses the complaint with prejudice.

In this matter, Policastro appears pro se and, as such, this Court must construe his pleadings liberally. See *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Mindful of this obligation, the Court reviews this motion by taking as true all factual allegations in the complaint and any reasonable inferences that can be drawn from them to determine whether Policastro may have a viable cause of action. *Higgens v. Beyer*, 293 F.3d 683, 688 (3d Cir. 2002) (citing *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996)). Accordingly, the facts recited below are taken from Plaintiff's Complaint, and do not represent this Court's factual findings.

Policastro is a teacher at Tenafly High School. Defendant Kontogiannis is the principal of Tenafly High School. Plaintiff alleges that during the morning of March 13, 2002, a memo, signed by thirteen teachers, was placed in the teachers' mailboxes and was subsequently removed by or under the authority of Kontogiannis. (Compl. ¶ 6). The memo was again placed back in the mailboxes and was again removed by or under the authority of Kontogiannis. (Id. ¶ 7). March 13, 2002 was ratification day for the teachers' contract, and the memo posed questions about the proposed contract. (Id. ¶ 8; Affidavit of Arthur R. Thibault, Jr. (hereinafter "Thibault Aff."), Ex. B). Plaintiff alleges that his First Amendment rights were violated by Kontogiannis' actions, and further alleges that the teacher mailboxes are used for personal messages, holiday cards, birthday cards, gifts, fliers from local merchants, memos from teachers, notes from teachers, notes from parents, notes from students, U.S. mail, union information and administrative concerns. (Compl. ¶ 10).

In Plaintiff's demand for relief, he requests that this Court deem unconstitutional and remove any language in any administrative manual for teachers, teacher manual, teacher contract, school policy, board policy, or administrative directive that requires administrative permission or prior approval of items placed in the teachers' mailboxes. (Id. ¶ 11). Plaintiff also requests that this Court deem unconstitutional the removal of memos or other communications between teachers from teachers' mailboxes. (Id. ¶ 13). Finally, Plaintiff requests that the teachers be allowed use of the school email system as well as other media facilities for personal messages. (Id. ¶¶ 14, 15).

The Administrative Manual (the "Manual") for teachers at Tenafly High School explains that the teachers' mailboxes in the high school "are the property of the Tenafly Board of Education and should be used for school business." The Manual further states that "any staff member wishing to distribute flyers/announcements, etc. (via the mailboxes) must have prior approval from the principal or vice-principal." (Thibault Aff., Ex. C).

The use of the teachers' mailboxes is also addressed in the Collective Bargaining Agreement ("CBA") between the Tenafly Board of Education and the Tenafly Education Association. The CBA provides that "the Association shall have the right to make reasonable use of the inter-school mail system for distribution of Association materials provided this does not interfere with school operations. The building Principal shall be made aware of such use." (Id., Ex. D).

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint "for failure to state a claim upon which relief can be granted." In considering a Rule 12(b)(6) motion, a court accepts as true all of the factual allegations within the complaint and any reasonable inferences that may be drawn from them. *Hayes v. Gross*, 982 F.2d 104, 106 (3d Cir. 1992). Claims will be dismissed under Rule 12(b)(6) only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 4546 (1957).

Accordingly, a district court reviewing the sufficiency of a complaint has a limited role. In performing that role, the court determines not "whether the plaintiffs will ultimately prevail," but "whether they are entitled to offer evidence to support their claims." *Langford v. Atlantic City*, 235 F.3d 845, 847 (3d Cir. 2000); *see also In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1420 (3d Cir. 1997); *Syncsort Inc. v. Sequential Software, Inc.*, 50 F. Supp. 2d 318, 325 (D.N.J. 1999); *In re Mobile Media Sec. Litig.*, 28 F. Supp. 2d 901, 922 (D.N.J. 1998). Generally, the court's task requires it to disregard any material beyond the pleadings. *Burlington Coat*, 114 F.3d at 1426; *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993). A district court may, however, consider the factual allegations within other documents, including those described or identified in the complaint and matters of public record, if the plaintiff's claims are based upon those documents. *Burlington Coat*, 114 F.3d at 1426; *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 707 (3d Cir. 1996); *In re Donald J. Trump Sec. Litig.*, 7 F.3d

357, 368 n.9 (3d Cir. 1993); *Pension Benefit Guar. Corp.*, 998 F.2d at 1196. References to documents attached to the complaint do not convert a motion to dismiss into a summary judgment motion. *Burlington Coat*, 114 F.3d at 1426.

Plaintiff's Complaint challenges the policy of the Board that requires teachers who wish to utilize the teacher mailboxes to obtain permission from the school principal. Plaintiff alleges that the policy violates his rights under the First Amendment.

The United States Supreme Court has recognized that "teachers [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 506 (1969). First Amendment protection extends to many places, including a teacher's mailbox. *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 44 (1983). However the Supreme Court has never suggested "'that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs. . . for unlimited expressive purposes.'" Id. (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 11718 (1972)). Instead, the right to freedom of speech depends upon the character of the property or forum at issue. *Perry*, 460 U.S. at 44.

In *Perry*, the Supreme Court distinguished between three types of government property and the government's ability to limit speech on each type of property. First, the Court discussed the traditional public forum. Id. at 45. The traditional public forum is comprised of streets and parks which "'have

immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" Id. (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). For the government to enforce a content-based exclusion in the traditional public forum, the regulation must serve a compelling state interest and must be narrowly drawn to achieve that interest. Id. at 45.

The second type of public property "consists of public property which the state has opened for use by the public as a place for expressive activity." Id. Examples of this type of forum include university meeting facilities, school board meetings, and municipal theaters. Id. Although reasonable time, place, and manner restrictions are permitted, any content-based prohibition can only be effectuated when there is a compelling state interest. Id. at 46.

The third type of government property is the non-public forum. Id.[1] In addition to time, place, and manner regulations, the state may place a content-based prohibition "as long as the regulation on speech is reasonable and not an effort to suppress expression

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[1] The courts have recently defined a fourth category of government property called the limited public forum. A limited public forum "is one that the government opens to particular type of communicative activity, on the basis of subject matter and speaker identity." *Child Evangelism of N.J., Inc. v. Stafford Township Sch.* Dist., 233 F.Supp. 2d. 647, 657 (D.N.J. 2002) (citing *Milford*, 533 U.S. at 107). The government's right to restrict access to a limited public forum is subject to the same level of scrutiny as the non-public forum.

merely because public officials oppose the speaker's view." Id.

The Supreme Court held that the school mail facility in *Perry* fell under the third category. Id. The Court noted that the mailboxes are not open to the general public, and instead, permission to use the system must be given by the building principal. Id. The Court concluded that the school district's policy restricting access to the mailboxes was reasonable. Id. The policy preserved the property for its intended purpose, communication with teachers, while preventing the mail system "from becoming a battlefield for inter-union squabbles." Id. at 52.

In this case, as in *Perry*, the teacher's mailboxes fall under the category of a non-public forum.[2] Therefore, the Court must determine whether the District's policy regarding the mailboxes is reasonable in light of the purpose served by the forum, *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985), and is not discriminate based on viewpoint. *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 106 (2001).

The Administrative Manual for teachers at Tenafly High School sets forth that the mailboxes are the property of the Tenafly Board of Education and should be used for school business. (Thibault Aff., Ex. C). The Manual further states that "any staff member wishing to distribute flyer/announcements, etc. (via

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[2] Although Plaintiff claims that the mailboxes are a limited public forum, limited public forums and non-public forums are subject to the same level of scrutiny.

the mailboxes) must have prior approval from the principal or vice-principal." (Id.).

The Court finds that this policy is reasonable in light of the purpose of the mailboxes, that is to allow the administration to communicate with the teachers. Moreover, the policy is necessary in order to make sure the teacher' mailboxes do not become inundated with flyers and announcements not related to school business that could interfere with the teachers' ability to receive important announcements from the school administration. Finally, the policy is viewpoint neutral.

Pursuant to the contract between the Tenafly Board of Education and the Tenafly Education Association (the "union"), the union has "the right to make reasonable use of the interschool mail system for distribution of Association material provided that this does not interfere with school operations. The building Principal shall be made aware of such use." (Thibault Aff., Ex. D). The contract permits the union to communicate with their members as long as the school principal is on notice of such use. However, Policastro is not the union, he is a teacher. In order to use the mailboxes, he was required to secure permission from the school principal. Furthermore, Policastro could have used other means of communication such as U.S. mail, in person, via telephone, etc. to communicate with the other teachers. The fact that the teacher mailboxes may have been the most effective means of communication does not mean that unrestricted access is required by the First Amendment. See *Cornelius*, 473 U.S. at 809.

Accepting all of Policastro's facts as true, he cannot establish a violation of his First Amendment rights. The teachers' mailboxes are non-public forums, and use can be regulated or restricted as long as it is viewpoint neutral and reasonably related to the forum. In this case, the policy requiring teachers to obtain permission from the school principal before using the mailboxes is both reasonable and viewpoint neutral. Therefore, for the reasons discussed above, the Court grants Defendants' motion to dismiss the complaint for failure to state a claim. An appropriate order follows.

Dated: June 8, 2004

/S/ JOEL A. PISANO, U.S.D.J

APPENDIX E

Questions for the Tenafly Negotiation Team 3/8/02[1]

Tenafly Schools boasts high levels of success for its student populations, as indicated by all statistical review of State and National testing results as well as other educational markers. We, the staff of the Tenafly Schools, have much to do with this success.

The efforts of the negotiations team are much appreciated. Still, we feel the following questions must be addressed:

1. Why haven't staff members been given salary guides of other districts as a basis of comparison? We feel this is crucial, given the steady decline in our salaries over the past three contracts. Do we not deserve parity with neighboring and/or comparable districts?

2. Why have there been virtually no informational meetings or other feedback (written correspondence) pertaining to the status of negotiations?

3. Why are we being given only one (1) day to review the proposed salary guide before ratifying the contract? At a meeting with TEA negotiation members

[1] The memo, dated 3/8/02, was placed in the teacher mailboxes on 3/13/02.

in February, a teacher asked for at least two (2) weeks to review the proposed guide. There were no objections to this from anyone in attendance, yet we get one day to study our possible salaries. Why?

4. Why were no other contractual issues except salary brought to the negotiations table? Building representatives asked members for their contractual concerns and suggestions. These concerns seem to have been ignored. Why?

5. What was the negotiating team's original proposal to the Board?

Respectfully submitted,

/s/ Andrew Policastro and 12 other Tenafly High School teachers.

APPENDIX F

TENAFLY HIGH SCHOOL
TENAFLY, NEW JERSEY

MEMORANDUM

DATE: March 25, 2002
TO: Mr. Howard Glaser, TEA
FROM: Dr. Dora P. Kontogiannis

As per our conversation on March 14, 2002, we discussed two issues that addressed the teachers' mailroom. It was brought to my attention on Wednesday, March 13 that a flyer was placed in the teachers' mailboxes without administrative permission.

The administration removed the flyers from the teachers' mailboxes. Within ten minutes, I was, once again, informed that the flyers were placed in the teachers' mailboxes. At that time a decision was made to close and lock the mailroom to prevent further disruption in the building.

Please be reminded, in the future, anyone wishing to place information in teachers' mailboxes must first obtain administrative permission.

DPK:aq

APPENDIX G

From: Art Thibault [xxxx@xxxx][1]
Sent: Thursday, April 28, 2005 9:58 AM
To: 'Andrew Policastro'
Subject: RE: Local Rule 8.1

Mr. Policastro,

I acknowledge receipt of your statement of damages and will accept same as compliance with Local Rule 8.1.

Arthur R. Thibault Jr., Esq.
APRUZZESE, McDERMOTT,
MASTRO & MURPHY, P.C.
25 Independence Blvd.
P.O. Box 112
Liberty Corner, New Jersey 07938
(xxx) xxx-xxxx
(xxx) xxx-xxxx (fax)
xxxx@xxxx

-----Original Message-----
From: Andrew Policastro
[mailto:apolicastro@optonline.net]
Sent: Wednesday, April 27, 2005 4:11 PM

[1] I intentionally blocked Mr. Thibault's email address and phone number for his privacy.

To: xxxx@xxxx
Cc: apolicastro@optonline.net
Subject: Local Rule 8.1

Mr. Thibault,
Would your please reply back to this email if accepting that I have complied with your "Demand for Statement of Damages".

Besides all demands asked for in my original complaint, demands 11-15, I ask for $10,000,000 (Ten million dollars) as the amount of damages claimed in this action.

Andrew Policastro

APPENDIX H

Excerpt of June 30, 2005 Hearing
before Judge Pisano
Asking for Ten Million Dollars in Damages

* * *

THE COURT: I understand all of that. You'll have a chance to raise all of that.

Is there any claim for damages here? Are you making any claim for monetary damages? What is the relief you seek?

MR. POLICASTRO: In the compiaint I have none.

Tenafly responded with, I forget what the letter said, and I asked for ten million back for my --

THE COURT: You asked for what?

MR. POLICASTRO: Ten million.

THE COURT: $10 million?

MR. POLICASTRO: I asked for that so the lawsuit wouldn't stop.[1]

---

[1] I did not know how to ask for one dollar in nominal damages. I thought that if I asked for $1 and Tenafly sent me a check for $1

THE COURT: Is that in the complaint?

MR. POLICASTRO: No. I'm asking for nothing in the complaint.

THE COURT: All you want is injunctive relief?

MR. POLICASTRO: That's correct.

* * *

---

the lawsuit would be over. That is why I asked for Ten million. The excerpt is from pages 11-12 of the transcript.

APPENDIX I

From: Larry Tribe [xxxx@xxxx][1]
Sent: Friday, August 12, 2005 1:37 PM
To: apolicastro@optonline.net
Cc: 'Amy Porter';'Kathy McGillicuddy'
Subject: Policastro v. Principal of Tenafly High School and Tenafly Board of Education
Attachments: JANCASE.pdf; POLICASTRO TRIAL BRIEF.pdf

Mr. Andrew Policastro
Tenafly High School

Dear Mr. Policastro:

I have read the Third Circuit opinion reversing the district court's decision to dismiss your complaint; holding that you had indeed stated a cause of action for a violation of your First Amendment rights under the *Tinker* standard; essentially accepting the analysis put forward quite ably in your trial brief, which I have also read; and accordingly remanding the case for trial under the appropriate constitutional standard.

Given the interlocutory posture of the proceedings, there is clearly no plausible basis for the defendants to seek further judicial review at this point, either in the

[1] I intentionally blocked Prof. Tribe's email address, address and phone number for his privacy.

Third Circuit en banc or in the U.S. Supreme Court, much as they might wish to avoid a trial altogether. And there is of course no reason you could possibly want to complain of your own victory in the Third Circuit. So you must be seeking not appellate assistance, which is the only kind of assistance I ever provide (and then usually only in the U.S. Supreme Court), but assistance in conducting the trial against the school principal and the board of education, which is completely beyond the reach of my practice.

With best wishes,

Laurence Tribe

Laurence H. Tribe
Carl M. Loeb University Professor
Harvard University
xxxx
Cambridge, Massachusetts xxxxx
Office: xxx-xxx-xxxx

APPENDIX J

From: Eugene Gressman [xxxx@xxxx][1]
Sent: Friday, September 09, 2005 12:28 PM
To: apolicastro@optonline.net
Subject: Teacher Tinker case

I am shocked to think that neither the ACLU nor the techers union would offer you any help in your case. And I must say you did a bang-up job in writing your trial court brief. Are you sure you are not a lawyer?

Anyway, since you are facing a trial on the merits, I find two critical factors that should be added to your case.

1. A copy of the memo, signed by 13 teachers, that was placed in the teacher mailboxes and then removed by the principal.

2. Some description, either through your testimony or by some written paper, telling us what inspired your memo. Was there some scheduled meeting of the authorities to consider or ratify a new contract for the teachers, including whatever inspired your memo? Had there been other papers in the mailboxes telling the teachers about some upcoming meeting of the authorities and inviting any teacher comments? Was

[1] I intentionally blocked Prof. Gressman's email address for his privacy.

this a meeting of the school board in which the interests of the teachers would be expressed by the teacher's union? Were increased salaries an item to be discussed at this meeting? Did the principal say that he would represent all the interests of the teachers, and did he invite any teacher comments about the prospective meeting? You say that the meeting was called to "ratify" the new contract, but had the teachers been heard from in the earlier stages of developing the contract?

In short, build a record as to what this meeting was about and whether you teachers were expected to, or forbidden to, express any views. Or were you bound or limited by what the teachers union proposed to say at this meeting about ratification? What was it that the principal feared might happen if your memo went forward through the mailboxes to the teachers only? Was this meeting open to the public, including newspaper reporters? Finally, do you know why the union and the ACLU refused to represent you in this legal proceeding?

In short, I think it critical to your case that you explain or submit a copy of the excluded memo. Good luck.

Prof. Emeritus Eugene Gressman

APPENDIX K

From: Policastro, Andrew
Sent: Monday, October 01, 2007 11:08 AM
To: Sherman, Morton; Mackay Staff; Maugham Staff; Smith Staff; Stillman Staff; Middle School Staff; High School Staff; Central Office Staff
Cc: 'Don Kaplan'; 'Janice Jacobs'; 'Jon Teall'; 'Julie Segal'; 'Mark Aronson'; 'Phyllis Kesslen'; 'Richard Press'; 'Rick Fooshee'; 'Virginia Pirie'
Subject: RE: student management system

Dr. Sherman,

You email states, "So, how do we move ahead? We are now involved with a management system that is making many folks unhappy as it is perceived to not meet our needs, is cumbersome, and some have said a step back for us."

I suggest that we move ahead by asking an outside group or the Bergen County Commissioner of Education to investigate the Cimple fiasco.

You wrote briefly about the 1999 appeal to the NY Commissioner of Education (Decision No. 14, 274 – December 21, 1999) and that the appeal was denied.

The following powerful quotes from the appeal, which I am sure you read before Tenafly approved their Cimple contract, reinforce the need for an outside inquiry-

"Although I am constrained to dismiss the Cimple contract claim as untimely, I am deeply disturbed that a contract in excess of one-half million dollars was signed without review by the district's attorney and apparently without formal authorization by the board, that the district contracted to pay a pre-performance installment of $195,000, approximately 35% of the entire contract, with no justification for such advance payment provided in the record, and that such fiscal practices were justified by the board on the basis of a purported need to put these services in place as soon as possible.

Although respondents assert that Dr. Sherman was authorized to "sign" the contract on the board's behalf, respondents provide no evidence of such authority or the means by which such authority was delegated to Dr. Sherman.

Respondents also provide no proof that the board actually performed its duty to evaluate the three proposals and determined that the Cimple proposal would be in the taxpayers' best interests, as required by General Municipal Law §104-b, prior to execution of the contract. Respondents similarly provide no evidence that the board or superintendent conducted sufficient inquiry to assure that Cimple was capable of performing the contract (Appeal of Brau Bus Corporation, 22 Ed Dept Rep 76, Decision No. 10,886)."

The appeal also states, "Cimple breached its obligations under the contract, and on February 11, 1998 the district terminated the contract and demanded the return of $97,500, plus an additional $48,750 for inadequate performance. The record

indicates that Cimple had not repaid any of the money, and the district was contemplating suit against Cimple, as of the date of respondents' answer."

Frank Romano, our former Technology Director is now Assistant Superintendent in Milburn. You have now appointed Dr. Kontogiannis chair of the of the Cimple Task force. Mr. Romano and Dr. Kontogiannis are personal friends, she was also on his dissertation committee. Out of the over 600 school districts in NJ, Dr. Kontogiannis' daughter just got her first teaching position in Milburn.

I have no doubt that Dr. Kontogiannis can lead the task force to investigate Cimple, but this appointment does not pass the "smell test".

We need an outside group to investigate.

Andrew Policastro

From: Sherman, Morton
Sent: Friday, September 28, 2007 12:58 PM
To: Mackay Staff; Maugham Staff; Smith Staff; Stillman Staff; Middle School Staff; High School Staff; Central Office Staff
Cc: Don Kaplan; Janice Jacobs; Jon Teall; Julie Segal; Mark Aronson; Phyllis Kesslen; Richard Press; Rick Fooshee; Virginia Pirie
Subject: student management system

To: All Tenafly Staff
From: Mort Sherman
Re: New Student Management System

Date: September 28, 2007

Most of you know that we implemented a new student management system, Cimple, during the summer.

All of us had hoped that the transition to the new system would be easy, seamless, and quick. This has not been the case so far.

The history of how we came to this point is clear. The question of what we do now is not so easily answered.

During the 2006-07 school year, we were advised that SASI, our student management system in place at that time, was not going to be continued to be supported or upgraded at some point down the line. In a proactive and positive manner, our previous Asst. to the Supt for Curriculum, Instruction, Assessment, and Technology began looking at systems which would support our scheduling, attendance, discipline, progress and report cards, transcripts, and other student management needs, as well as include a data management system that could be tied into the student records. Our previous system did not have that connection.

The intent was a very good one. We wanted to be proactive as we offered connected, easy to use, and professional systems to all of our staff. Our goals continue as they were last winter and spring.

The process in reviewing available management systems included administrators and staff members. As early as last February and March, our Asst. to the Supt for Curriculum, I, A,.and Technology met with administrators and offered opportunities

through them to staff to review what was being proposed as a new student management system. Recent concerns have indicated that the process should have been more inclusive and should have looked deeper at the systems.

However, now that we have had some experience with Cimple, substantive questions have been raised which must be addressed.

One of the questions is whether we can go back to the old system. As we do research on this, we find that SASI is still in the same place it was last year... being phased out.

Another question is whether we must keep the present system long term or can we begin a search for a new student management system. The Cimple contract we have guarantees that the company will meet the unique needs of our district or will give a 100% refund at the end of the year.

A third question which has recently come up is about my prior involvement with Cimple. There was an appeal to the NY Commissioner's office in 1999 (appeal denied) two years after I left S. Orangetown, NY, as superintendent. The claim was that the business procedures did not follow standard practices in creating a contract with Cimple. The conclusion was that there was little or no basis for the claims, although the business manager of that district did not stay. Because the system was implemented as I was leaving, I had no direct experience with the performance of Cimple in that district. When asked last year about the N.Y.S. Ccommissioner's appeal, my

answer was then as it would be now: let's find the best system for our district. I thought about not allowing consideration of Cimple; however, the review of the product was very positive.

So, how do we move ahead? We are now involved with a management system that is making many folks unhappy as it is perceived to not meet our needs, is cumbersome, and some have said a step back for us. There are also some positives. One suggestion which has been made is that we explore other systems options... another suggestion is to work the best we can through this year and then make a decision about the present system under the contract which guarantees success and satisfaction. If we think of this in a way similar to the Lemon Laws protecting owners of cars, we know that certain procedures and timetables have to be followed. However, as we are following those procedures and timetables, we are also looking at other options and talking to other districts.

Perhaps the best course for us right now is to create a task force of teachers, secretaries, and administrators who will work with Michael Ulshoefer (our new Technology Coordinator) and Wayne Demikoff (Business Administrator) to combine both suggestions from above: look at other systems as we continue through this year to make a final determination under the existing contract.

The task force will be chaired by Dr. Dora Kontogiannis, our high school principal. It is most important that those who actually use the systems be part of these reviews and final recommendations. I would like to convene this task force within the next

several weeks. The task force will meet regularly throughout the year (the schedule can be determined by the members) until recommendations are made. If you are interested in being part of this task force, please let Dora, Michael, or me know.

Thank you for your patience and professionalism.

Mort Sherman

APPENDIX L

Mr. Andrew Policastro
59 Day Avenue
Tenafly, NJ 07670

October 4, 2007

Dear Mr. Policastro:

Effective immediately, I am suspending your use of the Tenafly network privileges in accordance with Policy 6142.10 "Acceptable Use of Educational Technology."

Your broadcast use of our email system on Monday, October 1, 2007, violated at least two provisions of this policy:

-"...computer networked services are provided exclusively for ...those purposes that relate to job performances."

-"The broadcasting of any message without first seeking authorization from a building or district administrator is not permitted."

The suspension of your privileges or any use of the Tenafly email system or any other parts of our network is until further notice. Student record keeping and other communication needs will be addressed by you in cooperation with your immediate supervisor and other members of the high school administration.

Based on your violation of board policies, I am officially reprimanding you for your conduct. Further violation of board policies may lead to additional disciplinary action.

Sincerely,
/s/
Morton Sherman, Ed.D.
Superintendent of Schools

C: Members, Board of Education
Dr. Dora Kontogiannis
Personnel File